No. 14188

In the

United States Court of Appeals

For the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee,*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation, *Appellants.*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

APPELLEE'S PETITION FOR RE-HEARING

Appeals from the United States District Court
for the District of Oregon

HONORABLE JAMES ALGER FEE, Chief Judge

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TABLE OF AUTHORITIES

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It is apparent from the Court's opinion that erroneous factual assumptions prompted the Court to disallow $50,000 of the award made by the trial court against appellants McKenney and Glaser.

In order to demonstrate the Court's error and to permit its correction, it is only necessary to refer to and consider two paragraphs of the opinion.

We refer first to the third paragraph on page 6 of the opinion which is:

> "By whatever name it may be called, the one point that does seem to have merit is the one pressed by the McKenneys that there is double compensation here, that the sum of $118,000 overlaps the $50,000 found as against McKenneys and Glasers and tripled against the Buol-Carr Company. That is to say, if the Belding lumber [logs] (with the $50,000 price tag) along with other lumber [logs] had been delivered to Buffelen, the latter's mill would have had a $118,000 profit and nothing for stumpage under the June 1948 contract. The court gives $168,000. Thus Buffelen gets more for not processing the lumber [logs] than if it had."

We will now point out the errors in the second, third, and fourth sentences of this paragraph to prove that the conclusion expressed in the first sentence is wrong.

The Court says:

> "That is to say, if the Belding timber [logs] (with the $50,000 price tag) along with other lumber [logs] had been delivered to Buffelen, the latter's mill would have had a $118,000 profit and nothing for stumpage under the June 1948 contract."

We construe this to mean: "If logs from the Belding tract which were in Buffelen's name (which were admittedly worth $50,000) along with other logs from other tracts covered by the January 8, 1948, contract,

which were in McKenney's and Glaser's names, had been delivered to Buffelen by McKenney and Glaser as required by the contract, the Batterson mill would not have sustained a loss of profit of $118,000 [and Buffelen would have received nothing from McKenney and Glaser as stumpage under the contract]."

The bracketed portion at the end is completely immaterial because no claim has ever been made anywhere in this case that McKenney and Glaser owed Buffelen stumpage on any timber which they did or did not deliver to the Batterson mill. Buffelen admittedly had to pay the market price for all logs delivered to the mill and *the cost of such logs was taken into account in arriving at the monthly operating profit which Buffelen lost by reason of McKenney's and Glaser's failure to deliver logs to the mill* (See Exhibits 19-A, 19-B, 19-C and 22 Vol. II Tr. p. 480).

This sentence as it appears in the opinion or as rephrased above is correct, but it does not furnish support for the next sentence of the opinion, which is as follows:

"The court gives $168,000."

If this last sentence is to be construed as meaning: "The court gives $168,000 because of the failure of McKenney and Glaser to deliver logs from their hold-

ings and from Buffelen's holdings to the Batterson mill", it is completely wrong, since only $118,000 was allowed as against McKenney and Glaser for their breach of the contract in failing to deliver logs to the Batterson mill. *The $50,000 award was for a separate independent breach by McKenney and Glaser in attempting to convey away Buffelen's Belding tract, as a result of which Buol-Carr Company stole timber therefrom, admittedly worth $50,000.*

Now for the last sentence in this paragraph:

> "Thus Buffelen gets more for not processing the lumber [logs] than if it had."

Here is where the Court's error proves itself.

What did the Court allow because McKenney and Glaser failed to comply with the contract and deliver logs to the Batterson mill? $118,000, not $168,000, as the Court erroneously assumes in this paragraph.

Reference to Finding of Fact XII and Conclusion of Law XI conclusively proves our point.

Finding XII (Vol. 1 Tr. pages 88-89) is as follows:

> "Plaintiff sustained damages in the amount of $118,000 for loss of profit in the operation of its mill at Batterson, and in the amount of $50,000 for timber removed by defendant McKenney Logging Corporation (called Buol-Carr Company in the

opinion) by reason of their breach of the contract, which is plaintiff's Exhibit 1, and by the attempted sale by defendants McKenney and Glaser of their interest in the properties and rights covered by the contract, which is plaintiff's Exhibit 1, to defendant McKenney Logging Corporation." (Buol-Carr Company).

Conclusion XI (Vol. 1, Tr. p. 93):

"Defendants McKenney and Glaser are liable to plaintiff for $168,000 damages sustained by it and specified in Finding of Fact XII by reason of the breach of the contract, which is plaintiff's Exhibit 1, (and) by reason of the attempted sale and conveyance on September 1, 1951, to defendant McKenney Logging Corporation (Buol-Carr Company)."

What would Buffelen have made if McKenney and Glaser had complied with the contract and had delivered logs to the mill?

$118,000 net profit.

It is true that Buffelen would have paid McKenney and Glaser the market price for all logs delivered to the Batterson mill for processing, *but this was taken into account at arriving at $118,000 lost profit*, and by paying for logs, labor, etc., a profit of $118,000 would have been made and was lost. (See Exhibits 19-A, 19-B, 19-C and 22 Vol. II Tr. p. 480).

The fatal error which the Court has made is in failing to understand that McKenney and Glaser did *two* things, not one, and that Buffelen sustained and the trial court allowed $118,000 for one thing, and $50,000 for the other.

In other words, $168,000 was not awarded because of the failure of McKenney and Glaser to deliver logs to the mill in accordance with the contract, *only $118,000 was.*

The $50,000 award was for the other separate independent act committed by McKenney and Glaser in attempting to convey away Buffelen's Belding tract, making it possible for Buol-Carr Company to trespass upon and convert $50,000 worth of timber therefrom.

Admittedly, if all McKenney and Glaser had done was to breach the January 8, 1948, contract by failing to deliver logs to Buffelen's Batterson mill, $118,000 for loss of profits would have been the limit of Buffelen's recovery.

However, in addition to failing to deliver logs, McKenney and Glaser attempted to convey Buffelen's Belding tract to Buol-Carr Company, and admittedly Buol-Carr Company, on the basis of this attempted conveyance, entered on the Belding tract and removed $50,000 worth of Buffelen's timber.

The question, therefore, is: "Are McKenney and Glaser liable to Buffelen for this separate additional independent act."

The answer is definitely, "Yes."

The cases on this question are collected in an annotation in 127 A.L.R. at p. 1016, and the rule is there stated as follows:

> "The question of the liability of a grantor or lessor of property which he does not own to the true owner for the trespass of his lessee or grantee has arisen in many cases involving the sale of timber on the lands of another. The results of these cases seem to lead to the conclusion that he who assumes to sell timber on another's land, or the right to cut it, will be liable for the trespass of the purchaser in cutting it."

At p. 566 of 34 Am. Jur. (Logs and Timber, § 116) the following appears:

> "One who assumes to sell timber on another's land may be liable to the true owner for trespass by the purchaser in cutting the timber * * *."

Now let us refer to the second paragraph in the opinion which is infected with this same error.

It is the first paragraph on page eight of the opinion and is as follows:

"The nature of the claim of Buffelen is for a breach of contract which had not been rescinded by Buffelen for the breach. The court found a breach. As set forth in the Restatement of Contracts, Sec. 329, where a right of action for breach exists, compensatory damages will be given for the net amount of the losses [caused] and the gains prevented. The loss of mill profits meets this test. But if this contract had been performed by McKenney & Glaser, there would have been no payment by McKenney & Glaser for the timber. Therefore, for the McKenney & Glaser breach there *cannot* be compensation charged against them for the timber. To permit it, would be to make the claim against McKenney & Glaser half tort and half contract or half rescission and half affirmance. Therefore, $118,000 is all plaintiff is entitled to recover as against McKenney & Glaser."

Now let us consider the first sentence of this paragraph:

"The nature of the claim of Buffelen is for a breach of contract which had not been rescinded by Buffelen for the breach."

This is true, *but* McKenney and Glaser were guilty of *two* breaches, not one.

They refused to supply logs to the Batterson mill, causing the $118,000 loss of profits, *and* they attempted to convey away Buffelen's Belding tract to Buol-Carr

Company, which stole $50,000 worth of timber therefrom.

Now for the second sentence: "The court found a breach."

It found *two* breaches. First, McKenney and Glaser refused to deliver logs to the mill as required by the contract, causing $118,000 loss of profit, *and*, second, they breached the contract by attempting to convey Buffelen's Belding tract to Buol-Carr Company, as a result of which $50,000 worth of Buffelen's timber was stolen.

Finding of Fact XII and Conclusion of Law XI, quoted above, conclusively establish these conclusions.

The third sentence in this paragraph of the opinion is:

> "As set forth in the Restatement of Contracts, Sec. 329, where a right of action for breach exists, compensatory damages will be given for the net amount of losses [caused] and the gains prevented."

We have inserted the bracketed word "caused" in this statement to make it conform to Sec. 329 of the Restatement of Contracts, and so that its import may be correctly understood.

The trial court actually applied this rule in fixing the damages it allowed. It assessed $118,000 for loss of profits *and* $50,000 for Buffelen's Belding timber which McKenney and Glaser attempted to convey to Buol-Carr Company and which it stole.

In the next sentence of the opinion, it is said:

"The loss of mill profits meets this test."

But this is on the assumption that only *one* thing was done by McKenney and Glaser; that is, that they failed to supply logs to the mill, which caused the loss of profits.

In addition, McKenney and Glaser attempted to convey away Buffelen's Belding timber, and Buol-Carr Company, their grantee, stole $50,000 worth of Buffelen's timber.

This loss meets the test, too. The logs so removed were gone forever. Part of the timber assembled behind the Batterson mill was thus lost. The admitted value of the timber so lost was $50,000.

Under the authorities above cited, this loss was clearly recoverable, in addition to profits lost because of the failure of McKenney and Glaser to supply the mill with logs.

Now let us consider the next sentence:

> "But if this contract had been performed by McKenney & Glaser, there would have been no payment by McKenney & Glaser for the timber."

It is true that if McKenney and Glaser had supplied the mill with logs that McKenney and Glaser would not have paid Buffelen any stumpage, but by the same token, if they had supplied the mill with logs, there would have been no profit lost and no $118,000 awarded against them for lost profit. Whether McKenney and Glaser would have paid Buffelen stumpage for logs delivered is entirely beside the point.

Nowhere in this or any other law suit has Buffelen asserted a claim against McKenney and Glaser for stumpage owing on timber delivered to the mill. Instead of McKenney and Glaser paying Buffelen stumpage for timber delivered to the mill, Buffelen paid McKenney and Glaser the market price therefor, and this market price so paid was taken into account in determining what the profit of the operation of the Batterson mill would have been if logs had been supplied, and the $118,000 loss of profits was so determined.

Now let us consider the conclusion drawn in the next sentence of the opinion:

> "Therefore, for the McKenney and Glaser breach, there *cannot* be compensation charged against them for the timber."

No one has ever tried to make McKenney and Glaser pay Buffelen for logs they failed to supply to the Batterson mill. If all McKenney and Glaser had done was to fail to deliver logs to the mill, the timber reserved behind the mill would have remained intact. In addition to failing to deliver logs, McKenney and Glaser made it possible for Buol-Carr Company to steal $50,000 worth of timber out of the timber reserve behind the mill by attempting to convey Buffelen's Belding tract to Buol-Carr Company.

Which breach of the contract was in the court's mind when it drew this conclusion? If the court is talking about the *first* breach which was the failure of McKenney and Glaser to deliver logs to the mill, the conclusion is correct. Only loss of profits could be charged against them for failing to deliver logs to the Batterson mill, and that is what the $118,000 award was for.

$50,000 for the stolen timber can't be and wasn't charged against McKenney and Glaser for failing to deliver logs. Only $118,000 loss of profits was awarded for their breach in this regard.

The $50,000 award was for their separate additional breach in attempting to convey to Buol-Carr Company, Buffelen's Belding timber, as a result of which, $50,000 worth of timber was stolen by Buol-Carr Company and was thus eliminated from the timber reserve behind the mill.

Before Buffelen was willing to put in a mill in this isolated section, it wanted to be sure it had a supply of timber on which its mill could operate.

So McKenney and Glaser and Buffelen put together their timber holdings as a reserve behind the mill.

If all McKenney and Glaser had done in this case was to refuse to supply logs to the Batterson mill, $118,000 would have been the limit of their liability.

However, in addition to merely refusing to deliver logs to the mill, McKenney and Glaser breached the contract by attempting to convey to Buol-Carr Company part of the timber reserve behind the mill, as a result of which $50,000 worth of the reserve timber was lost.

Two wrongs were accomplished by them, both breaches of the contract, and they are liable for all the damages that flowed from these two breaches—$118,-000 loss of profit, and $50,000 loss from the timber reserve.

Now for the last two sentences of this paragraph of the opinion:

> "To permit it would be to make the claim against McKenney & Glaser half tort and half contract or half rescission and half affirmance. Therefore, $118,000 is all plaintiff is entitled to recover as against McKenney & Glaser."

Two breaches of the contract are involved, not one. Failure to deliver logs as required by the contract and an attempted conveyance of Buffelen's Belding tract which was a part of the reserve behind the mill, as a result of which $50,000 worth of the timber reserve was stolen by Buol-Carr Company.

There is nothing wrong in asserting two separate losses caused plaintiff by the defendants in one action. This is so even though one may be for a breach of contract and another for a tort. Federal Rules of Civil Procedure Rules 8 (a) and 18 (a); Vol. 2, Barron & Holtzoff, Federal Practice & Procedure § 504 p.p. 46 & 47; Vol. 6 Cyclopedia of Federal Procedure (3rd Ed) § 20.35.

Here, however, both claims are for breach of contract. The first for failing to deliver logs as required by the contract, the second for attempting to convey away Buffelen's Belding timber in violation of the con-

tract and without Buffelen's consent, which resulted in Buol-Carr Company stealing $50,000 worth of timber therefrom.

That the second claim is for breach of contract is determined by the authorities above cited, and also by *Lepla v. Rogers (1893) 1 Q.B. p. 31.* In the Lepla case a lease contained a covenant that the lessee would not assign or sublet the premises, or any part of them, without the consent in writing of the lessor. The lessee, without applying for the consent of the lessor, sublet the premises to a person who intended, as he knew, to use them as a turpentine distillery. The premises having been burned down by a fire arising from the use of the premises by the sublessee, the owner-lessor brought an action against his lessee for breach of contract, and the court held that the loss caused by the fire was the natural result of the breach of the contract, and was therefore recoverable against the lessee.

See also 3 Sutherland on Damages (4th edition) 3170-3174 Sec. 861.

Here Buffelen and McKenney and Glaser by the January 8, 1948, contract pooled their timber holdings as a reserve behind the Batterson mill. McKenney and Glaser covenanted not to sell or assign their interest under the contract without Buffelen's written consent.

Without Buffelen's knowledge or consent, McKenney and Glaser attempted not only to convey their interest under the contract to Buol-Carr Company, but also to convey to Buol-Carr Company, Buffelen's Belding timber which was a part of the timber reserve.

Based on the conveyance it received from McKenney and Glaser, Buol-Carr Company entered upon and cut and removed $50,000 worth of timber from the Belding tract.

The loss of $50,000 worth of timber from the timber reserve was the natural result of the breach of the contract by McKenney and Glaser and was therefore recoverable by Buffelen from them for breach of the contract, in addition to the loss of $118,000 profit for failure to deliver logs to the Batterson mill.

This analysis shows that the court's statement on the top of page 9 of the opinion; "But added together, the sum of the parts, $118,000 plus $50,000, adds up to too much compensation for Buffelen's actual damage," is also erroneous. Buffelen lost both the profit of the operation of its Batterson mill and timber from the reserve behind the mill.

Since this sentence of the opinion deals with the trial court's award against Buol-Carr Company, it is of no practical significance, since, as the court probably

suspects, Buol-Carr Company is an empty shell and no judgment against it in any amount is recoverable.

We respectfully submit that the court's opinion must be modified to restore the $50,000 award against McKenney and Glaser for loss of Buffelen's Belding timber, which will result in full affirmance of the trial court's judgment against defendants McKenney and Glaser.

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I, JAMES C. DEZENDORF, one of counsel for appellee herein, certify that in my judgment, this petition for re-hearing is well-founded and that it is not interposed for delay.

James C. Dezendorf